NISSAN MOTOR CO LTD

v.

TECK GUAN AUTOMOBILE SDN BHD

COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD JCA
MOHD SAARI YUSOFF JCA
KC VOHRAH JCA
[CIVIL APPEAL NO: S02-460-99]
4 JULY 2002

CIVIL PROCEDURE: *Service - Out of the jurisdiction - Application for leave to serve out of the jurisdiction - Application merely stating that O. 11 r. 1(1) Rules of the High Court 1980 was relied upon - Exact paragraph relied upon not specified in affidavit-in-support - Whether contents of affidavit together with statement of claim showed that application was proceeded under O. 11 r. 1(1)(f) or (g) - Whether leave of court should be granted - Whether requirements of O. 11 r. 4(1) and Form 12 complied with*

CIVIL PROCEDURE: *Writ of summons - Renewal - Discretion of court to extend validity of writ - Whether there were good reasons to exercise discretion - Difficulty in effecting service - Cause of delay in effecting service beyond plaintiff's control - Whether validity of writ should be extended - Service out of the jurisdiction - Rules of the High Court 1980, O. 11 r. 1(1), 4(1)*

The plaintiff brought a suit against three defendants for breach of contract and obtained an *ex parte* order for leave to serve its writ out of the jurisdiction. Subsequently, the plaintiff obtained an *ex parte* order for seven renewals of the writ. The defendants then applied to set aside the said orders but it was refused by the deputy registrar. This was the 1st defendant's appeal from the decision of the judge in chambers affirming the decision of the deputy registrar.

Held:
Per Mohd Saari Yusoff JCA

[1] Whilst it is always preferable that an applicant states the precise rule or paragraph upon which he relies, a failure to so stipulate is not fatal to the application so long as the applicant can bring himself within the relevant rule or paragraph. Here, although the plaintiff had merely indicated in its application for leave that it was relying on O. 11

r. 1(1) Rules of the High Court 1980 ('the RHC') and did not specify in its affidavit-in-support the exact paragraph being relied upon, yet the contents of the affidavit together with the statement of claim revealed that the application was being proceeded on the basis of para. (f) or (g) of O. 11 r. 1(1) RHC. The order for leave to serve the writ out of the jurisdiction should not, therefore, be set aside on this ground. (p 675 d-f)

[2] The plaintiff had complied with O. 11 r. 4(1) RHC in that it had provided all the information that was required in an affidavit in Form 12. (pp 675 h & 676 a-d)

[3] Difficulties in effecting service of a writ may well be a good reason for the court to exercise its discretion to extend the validity of the writ. Here, the delays in effecting service of the plaintiff's writ was attributable to circumstances beyond the plaintiff's control and which involved the foreign office. The plaintiff had good reasons and the instant court would not be justified in disturbing the findings of the judge in chambers. (pp 677 f-h & 678 a-i)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Plaintif membuat tuntutan terhadap tiga defendan kerana kemungkiran kontrak dan telah memperoleh perintah *ex parte* mengizinkannya membuat serahan writ di luar bidangkuasa. Berikutnya, plaintif memperoleh perintah *ex parte* bagi memperbaharui writ sebanyak tujuh kali. Ketiga-tiga defendan memohon untuk mengenepikan perintah-perintah pembaharuan berkenaan, tetapi permohonan mereka ditolak oleh timbalan pendaftar. Keputusan timbalan pendaftar kemudian disahkan oleh hakim dalam kamar. Ini adalah rayuan defendan pertama terhadap keputusan hakim dalam kamar tersebut.

Diputuskan:
Oleh Mohd Saari Yusoff HMR

[1] Sementara seseorang pemohon harus menyatakan dengan tepat kaedah atau perenggan di mana ia bersandar, kegagalan berbuat demikian tidak memudaratkan permohonan jika permohonan tersebut masih boleh dilengkong ke dalam kaedah atau perenggan yang berkaitan. Di sini, walaupun plaintif, dalam permohonan untuk keizinan, hanya menyatakan bahawa ia bersandar kepada A. 11 k. 1(1) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT') dan tidak menjelaskan dalam afidavit sokongannya tentang perenggan mana ianya bergantung, namun, kandungan afidavit dan penyata tuntutan plaintif menunjukkan bahawa plaintif bertindak di bawah

perenggan (f) atau (g) A. 11 k. 1(1) KMT. Perintah memberikan izin untuk membuat penyerahan di luar bidangkuasa, dengan itu, tidak harus diketepikan atas alasan ini.

[2] Plaintif telah mematuhi A. 11 k. 4(1) KMT kerana telah membekalkan kesemua informasi yang diperlukan dalam satu affidavit dalam Borang 12.

[3] Kesukaran dalam menyerahkan writ boleh menjadi alasan yang kuat bagi mahkamah menggunakan budi bicaranya melanjutkan keesahan writ. Di sini, kelewatan dalam menyempurnakan penyerahan writ adalah berpunca dari sebab-sebab yang diluar kawalan plaintif kerana ia melibatkan kementerian luar negeri. Plaintif mempunyai alasan-alasan yang kukuh dan mahkamah ini tidak mempunyai justifikasi untuk mengganggu keputusan hakim dalam kamar.

[Rayuan ditolak.]

Case(s) referred to:
Ratnam v. Cumarasamy & Anor [1965] 1 MLJ 228 ***(foll)***
Seaconsar Far East Ltd v. Bank Markazi Jomhouri Islam, Iran [1993] 4 All ER 456 ***(refd)***
Sunkyong International Inc v. Malaysian Rubber Development Corporation Bhd [1992] 3 CLJ 1531 ***(foll)***
Wadden v. Whitecroft-Scovill Ltd [1998] 1 All ER 996 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 11 rr. 1, 4(1)

For the appellant - Porres Royan (Connie Willie); M/s Skinner Lind Willie Wong & Chin
For the respondent - Marina Tiu; M/s Yap Chin & Tiu

[Appeal from High Court Sabah & Sarawak, Kota Kinabalu; Civil No: K243-1989]

Reported by Gan Peng Chiang

JUDGMENT

Mohd Saari Yusoff JCA:
The suit by the respondent ("the plaintiff") against the appellant ("the defendant") is for alleged breach of contract.

In the court below, the respondent obtained an *ex parte* order for leave to serve its writ out of jurisdiction and also obtained an *ex parte* order for seven renewals of the writ. The learned deputy registrar dismissed an application to set aside the orders. On appeal to the judge in chambers, the learned judge dismissed the appeal and affirmed the decision of the learned deputy registrar, hence this appeal.

In this appeal, issues raised by the appellant are as follows:

i) whether there is justification in the granting of leave to serve the writ out of jurisdiction;

ii) whether there is justification in the granting of the extensions.

On First Issue

The complaint of the appellant is that in the application for leave to serve the writ out of jurisdiction, the respondent had failed to state clearly under which paragraph of O. 11 r. 1 of the RHC 1980 the respondent was relying on. In the Supreme Court case of *Sunkyong International Inc v. Malaysian Rubber Development Corporation Bhd* [1992] 3 CLJ 1531; [1992] 1 CLJ (Rep) 310 Peh Swee Chin SCJ (as he then was) observed:

> While it is always far better to quote section and verse or specific order or rule in any application, it is never fatal to any application to omit to do so where the applicant can bring himself within any relevant specific order or rule.

On this issue, the learned judge of the court below said:

> It is true that the Plaintiff in their *ex parte* application for leave to serve out of the jurisdiction merely indicated that the application was made under O. 11 r. 1(1) and failed to state in their affidavit in support the relevant paragraphs of the said rules on which they relied. However, the contents of the affidavit together with the Statement Of Claim would in my opinion sufficiently show that the application was made under paragraph (f) or (g) of O. 11 r. 1 (1) of the Rules of High Court. In view of this I do not think that the Order for leave obtained in the present case ought to be set aside on this ground.

We agree.

Turning to another aspect of the case, the complaint of the defendant was that the plaintiff had failed to exhibit the relevant letters in support of the plaintiff's application for extensions. In this regard, it is pertinent to refer to O. 11 r. 4(1) of the RHC 1980 which reads:

> 4(1) An application for the grant of leave under rule 1 or 2 must be supported by an affidavit in Form 12 stating the grounds on which the application is made and that in the deponent's belief, the plaintiff has a good cause of action, and showing in what place or country the defendant is, or probably my be found.

In *Seaconsar Far East Ltd. v. Bank Markazi Jomhouri Islam, Iran* [1993] 4 All ER 456 at p. 463, Lord Goff observed:

> ... if in support of the plaintiff's *ex parte* application an affidavit is sworn in proper form deposing facts which, if proved, provide a sufficient foundation for the alleged cause of action, that should generally be enough for present purposes.

From the reading of O. 11 r. 4(1) RHC 1980 and the above passage by Lord Goff, it is observed that there is no requirement in law that the alleged letters must be exhibited. All that is needed is for the plaintiff to provide the information as is required under Form 12. In his judgment, the learned judge concludes:

> I would respectfully agree with Counsel for the Plaintiffs that in the present case the Plaintiff's by the affidavit of their former Solicitor Raymond Szetu has complied with Form 12. There was, therefore, in my view, sufficient evidence for the Court to exercise its discretion under O. 11.

We agree.

On Second Issue

On this issue, the respondent referred to a series of incidents which contributed towards the delay in effecting the service of the writ on the appellant. The incidents are as set out below:

(1) Although the writ was issued on the 28th October 1989, the application for leave to issue a concurrent writ and leave to serve out of jurisdiction was only granted on the 16th March 1990.

(2) That the Plaintiffs were only informed of the Order dated the 16th March 1990 on the 20th June 1990.

(3) That the Plaintiffs changed their solicitors and the brief was only settled in August 1990 (see the affidavit on Chin Hon Chong sworn on the 12th September 1990).

(4) That Mr. Chin Hon Chong of Messrs Yap Chin & Tiu at that time wrote for translation. That by September 1990, the translation had not been completed.

(5) That the request for service was made on the 23rd August 1990. There is nothing sinister or suspicious as the request could always be made first before translation.

(6) That the Deputy Registrar sent the Notice of Concurrent Writ to Wisma Putra on the 2nd October 1990. No response was received from them.

(7) That Messrs Yap Chin & Tiu send reminders but to no avail (see page 104 to 110 of Summons in Chambers).

(8) That due to the non-response from Wisma Putra, Messrs Yap Chin & Tiu took the trouble to enquire from a legal firm in Japan about the status of the service (see pages 111 to 121).

(9) That the Japanese law firm advised that the Japanese Government require certain conditions to be met in particular a guarantee from the Malaysian Government as well as an agreement for reciprocity.

(10) That Messrs Yap Chin & Tiu immediately informed this Honourable Court of the requirement (see page 131 of the Summons in Chambers) and requested Wisma Putra to assist in complying with the requirement of the Japanese Government.

(11) Unfortunately no response was received from Wisma Putra until September 1992 when they informed that service could not be effected as certain conditions had to be fulfilled. That the matter had been referred to the Attorney-General chambers.

(12) Only on the 16th May 1994 was the copy of the Law for Judicial Assistance to Foreign Courts (see page 153) was extended to Messrs Yap Chin & Tiu.

(13) On the 26th May 1994 the Court informed Messrs Yap Chin & Tiu that as the condition of the Law or Judicial Assistance to Foreign Courts had not been met, service has not yet been effected (see page 166 of the Summons in Chambers).

In his judgment, the learned judge observed that the aforesaid incidents were compounded by our Consular Authority misplacing the documents which had to be replaced with a new set of documents. Further, the Consular Authority appeared to have made a mistake in requesting the Ministry of Foreign Affairs of Japan to effect service, which act led to all sorts of conditions being imposed.

On the delay in effecting service of the writ, the court below concluded that it was mainly caused by circumstances beyond the control of the respondent.

In *Wadden v. Whitecroft-Scovill Ltd* [1998] 1 All ER 996 at p. 1000, Lord Brandon observed:

> In the *Kleinwort Benson* case the House, after reviewing a long line of authorities on the present RSC O. 6 r. 8 and its predecessor, laid down the following principles as applicable to the exercise of the court's discretion on an application for extension of the validity of a writ in cases where questions of limitation of action are involved. (1) On the true construction of O. 6 r. 8 the power to extend the validity of a writ should only be exercised for good reason. (2) The question whether such good reason exists in any particular case depends on all the circumstances of that case. Difficulty in effecting service of the writ may well constitute good reason but it is not the only matter which is capable of doing so. (3) The balance of hardship between the parties can be a relevant matter to be taken into account in the exercise of the discretion. (4) The discretion is that of the judge and his exercise of it should not be interfered with by an appellate court except on special grounds the nature of which is well established.

In applying the principle as enunciated above to the facts of the instant case, we agree with the court below that having regard to all circumstances of the case, the respondent had furnished good reasons which justified the court in granting the extensions.

On the question of non-disclosure of the expiry of the limitation period when applying for leave to serve out of jurisdiction, the respondent in fact disclosed that the limitation period would expire on 30 October 1989. Such information was, therefore, on record. What the respondent failed to do was to repeat the information in the supporting affidavits when applying for extensions. On this aspect of the case, the learned judge in the court below observed that the omission here was not sufficiently crucial or grave as to warrant the setting aside of the orders for extensions. We agree.

Based on the grounds as set out above, we do not think the appellant had any merit in this appeal which justified this court in disturbing the finding of the learned judge in the court below. In this regard, we wish to echo the statement by the Privy Council in *Ratnam v. Cumarasamy & Anor* [1965] 1 MLJ 228 at p. 229:

> The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co. v. Johnston* [1942] AC 130 per Lord Wright at p. 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v. Barilam* [1937] AC 473). Upon question of procedure the Board is slow to interfere with the discretion exercised by a lower court (*Mayor of Montreal v. Brown & Anor.* [1876] 2 App. Cases 168).

In the premise, we dismissed the appeal with costs here and below and we affirmed the decision of the learned judge. Deposit was ordered to the respondent for the account of costs to be taxed.

My learned brothers Abdul Hamid bin Haji Mohamad JCA and KC Vohrah JCA have read this judgment in draft and they have expressed their agreement with it.